SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

~~358~~

No. .....

EUGENE J. HANON, GLORIA MEYER and JOHN L. BOVERI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners Eugene J. Hanon, Gloria Meyer, and John L. Boveri pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on June 8, 1970.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not yet reported and is printed in the Appendix hereto (p. A-1).

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1970 (Appendix p. A-21). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

I. Whether the Fifth Amendment rights of a gambler (bookmaker) are violated when his failure to register and pay the occupational tax under Title 26 is used as the sole basis for a search warrant whereby physical evidence is seized which is later used to convict him of interstate gambling activities under Title 18, Section 1952 and 371.

A. Whether the search under warrant of a defendant's premises, and the seizure of incriminating physical evidence later used to convict him, are a "sanction" or "penalty" against such defendant.

B. Whether such search, seizure and use of evidence (if they are a "sanction" or "penalty") are permissible if they resulted solely from defendant's Fifth Amendment refusal to register and pay occupational tax as a bookmaker.

II. Whether **Marchetti v. United States**, 390 U. S. 39, and **Grosso v. United States**, 390 U. S. 62, should be retroactively applied to give full Fifth Amendment protection to one who, prior to those decisions, refused to register and pay occupational tax as a bookmaker.

STATUTES INVOLVED

Sections 371 and 1952 of Title 18, and Sections 4401, 4411, 4412, 4901, 7201, 7203 and 7262 of Title 26 are printed in the Appendix to this petition (p. A-22).

STATEMENT

Petitioners adopt in its entirety the statement of facts set forth in the opinion below (Appendix pp. A-2, 3) with the following brief additions.

The affidavits upon which the search warrants were based contained no allegations of interstate gambling operation (A. 21), and alleged only facts establishing probable cause for registration and tax violations under Title 26. The three judge panel originally assigned to this appeal in the Eighth Circuit, by a two to one majority, voted to reverse on the grounds that the **Marchetti-Grosso** doctrine made the search and seizure an unlawful sanction imposed upon petitioners because of the assertion of their Fifth Amendment rights. After rehearing before the Eighth Circuit *en banc,* the panel's judgment was vacated by a six to two vote, the two judges who constituted the majority of the panel now becoming the two dissenting judges (Appendix p. A-14).

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted on the first question presented to resolve a patent conflict between the Eighth Circuit's majority opinion below and recent decisions of this Court (followed by the dissent below) dealing with the meaning and effect of the Fifth Amendment privilege against self-incrimination. Those decisions, beginning with **Malloy v. Hogan,** 378 U. S. 1, make it abundantly clear that the self-incrimination privilege provides two distinct protections:

(1) The right to remain silent.

(2) The right to suffer no "penalty" for such silence.

The majority below does not recognize this second protection; in overruling the Fifth Amendment contentions it summarily holds (Appendix p. A-7):

> "The Fifth Amendment protects a person from being required to give testimonial disclosures. The issue of the legality of the search under the Fourth Amendment is separate and distinct from the issue of whether the evidence seized is self-incriminating."

In refusing to recognize that the search and seizure **do** raise a Fifth Amendment issue, the majority disregards the fact that the **sole** basis for the search warrants was each petitioner's failure to register and pay occupational tax as a bookmaker (under Title 26, Sections 4401, 4411, 4412, 4901, 7201, 7203, and 7262). Of course, under **Marchetti** and **Grosso**, that refusal was a lawful exercise of each petitioner's Fifth Amendment privilege. Hence, as the dissenting opinion below points out,

> "The majority's Fourth Amendment analysis fails to come to grips with the fact that a sanction has been applied to the defendant's lawful exercise of the Fifth Amendment privilege" (Appendix p. A-19).

The record and the majority opinion below demonstrate without question that the search warrant for each petitioner's premises was based **only** on Title 26 (registration and tax) grounds. Hence it is manifest that the search and seizure were the direct consequences of each petitioner's Fifth Amendment silence in refusing to register and pay occupational tax as a bookmaker. The majority does not recognize this as any "punishment" to petitioners; it holds that "defendants are not being punished criminally or otherwise for failure to comply with the wagering tax laws. They are being punished for violating § 1952, proscribing interstate gambling" (Appendix p. A-9). But this narrow reasoning directly conflicts with **Griffin v. California**, 380 U. S. 609, and **Spevack v. Klein**, 385 U. S. 511, both of which hold that

the Fifth Amendment protects the individual against "the imposition of **any** sanction" which makes assertion of the privilege costly. Here the sanction or punishment to which each petitioner was subjected (as the price for his silence) was the search of his premises, the seizure of incriminating physical evidence, and the ultimate use of that evidence to help convict petitioner of a felony. The majority opinion below thus injects confusion and doubt into the law which has been developed in the last decade on Fifth Amendment matters. It should be reviewed by this Court to resolve such doubt (as evidenced by the sharp differences of opinion between the majority and dissent below), and to provide the opportunity for this Court to announce whether or not the Fifth Amendment still prohibits **any** punishment or sanction whatsoever against one who lawfully asserts his self-incrimination privilege.

2. Certiorari should be granted on the second question presented as a controversial issue of vital importance in the administration of all criminal laws involving registrations which are affected by the **Marchetti** and **Grosso** holdings. Those decisions prohibited prosecutions for failure to register under certain laws, on the grounds that such failure was a lawful exercise of the Fifth Amendment privilege against self-incrimination. Both opinions, however, were silent as to whether or not the holdings therein would be given any retroactive effect. While the government concedes that **Marchetti-Grosso** should be applied retroactively in a "direct" way to bar prosecutions under the wagering tax laws which were pending (or still on appeal) at the time of those decisions,* it denies that such retroactive effect should extend to the search and seizure which resulted from a refusal by petitioners to register. While the majority

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* Appellee's Supplemental Brief on Rehearing in this cause below, page 3.

below adopts this view (relying principally upon **Linkletter v. Walker**, 381 U. S. 619, and **Desist v. U. S.**, 394 U. S. 244) the dissent points out that the actual penalty to each petitioner did not take place until the government **used** the evidence in prosecuting petitioner, which use occurred after **Marchetti-Grosso.**

Similar confusion exists in the state courts; in **Commonwealth v. Katz**, 429 Pa. 406, 240 A. 2d 809, the Pennsylvania Supreme Court held that a pre-**Marchetti-Grosso** search and seizure was nevertheless improper and the evidence seized therein not usable or admissible; on the other hand, the Supreme Courts of New Jersey and Missouri reached opposite conclusions in **State v. Gerards**, 53 N. J. 261, 250 A. 2d 130, and **State v. Sellaro**, 448 S. W. 2d 595, respectively.

This Court now has before it **United States v. U. S. Coin and Currency** (Angelini-claimant) 393 F. 2d 499, certiorari granted 393 U. S. 949, No. 8, October Term, 1969 (in which the Seventh Circuit upheld retroactive application of **Marchetti-Grosso**); **Mackey v. United States**, 411 F. 2d 504, petition for certiorari filed August 29, 1969, No. 529 (in which the Seventh Circuit denied retroactive application of **Marchetti-Grosso** under different circumstances); **DiPiazza v. United States**, 415 F. 2d 99, petition for certiorari filed December 17, 1969, No. 960 (in which the Sixth Circuit denied retroactive application); **Kuh... v. United States**, 415 F. 2d 111, petition for certiorari now pending, No. 1096 Misc. and **Deming v. United States**, 415 F. 2d 111, petition for certiorari filed December 18, 1969, No. 965 (retroactive effect again denied by the Sixth Circuit). On the other hand, the Fifth Circuit has unequivocally approved retroactive effect of **Marchetti-Grosso** in its per curiam opinion and order in **United States v. Lucia**, 423 F. 2d 697, affirming the prior decision of its panel at 416 F. 2d 920. Thus, the uncertainty and

confusion on this issue of retroactivity is manifest, and the instant case should be reviewed by this Court, together with others listed above, so that the entire matter can be thoroughly briefed and argued and an appropriate decision, touching all phases of the problems, rendered. In this regard, it is significant that the instant case is one involving a pre-**Marchetti** search warrant which was based exclusively on an enforcement of criminal statutes subsequently condemned in **Marchetti-Grosso.** (In **Di Piazza,** for example, the search warrant affidavit also included probable cause for violation of Section 1952 of Title 18, which is not affected by **Marchetti-Grosso**).

In summary, this Court has already indicated its desire to consider and rule on the retroactivity of **Marchetti-Grosso.** The instant case should be included in any such consideration, in the interest of the orderly administration of criminal justice, so that all aspects of this issue can be harmoniously considered and ruled.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 19,519.

United States of America,
Appellee,
v.
Eugene J. Hanon, Appellant.

No. 19,520.

United States of America,
Appellee,
v.
Gloria Meyer, Appellant.

No. 19,521.

United States of America,
Appellee,
v.
John L. Boveri, Appellant.

Appeals from the United States District Court for the Eastern District of Missouri.

[June 8, 1970.]

Before Van Oosterhout, Chief Judge; Matthes, Blackmun, Mehaffy, Gibson, Lay, Heaney and Bright, Circuit Judges, en banc.

Van Oosterhout, Chief Judge.

A panel of this court by opinion filed January 7, 1970, reversed the judgments of conviction in these cases. Pursuant to the affirmative vote of a majority of the active

judges under Rule 35, Federal Rules of Appellate Procedure, a rehearing en banc has been ordered in these cases and the appeals have been heard by the court en banc.

Defendant John L. Boveri was charged in Counts I and II of an indictment with violating 18 U. S. C. A. § 1952 by unlawfully, willfully and knowingly engaging in gambling activities in violation of Missouri law through the use of the facilities of interstate commerce.

Boveri and defendants Gloria Meyer and Eugene J. Hanon in Count III were charged with conspiracy, under 18 U. S. C. A. § 371, to violate 18 U. S. C. A. § 1952.

Boveri was convicted by a jury on all three counts. Meyer and Hanon were convicted on Count III. Each of the defendants has taken this timely appeal from their convictions and the resulting sentences.

Each defendant has as a basis for reversal urged:

1. Error in failing to suppress evidence seized in searches made at each of their residences in violation of their Fourth and Fifth Amendments rights.

2. Failure to sustain motion for acquittal based on insufficiency of the evidence to support the conviction.

We affirm the convictions for the reasons hereinafter stated.

The intelligence agents of the Internal Revenue Service began an investigation of the gambling activities of defendant Boveri and others in April of 1967. Richard Sirmer, who had served as a clerk in Boveri's bookmaking operation, gave the officials information as to Boveri's gambling operations which an independent investigation by the agents showed to be reliable. Applications for search warrants, supported by detailed affidavits, were filed with the United States Commissioner, who on August 12,

1967, issued search warrants authorizing a search of the homes of Boveri, Meyer and Hanon for gambling paraphernalia. The warrant affidavits set forth probable cause for violation of 26 U. S. C. A., §§ 4101, 4411, 4412, 4901, 7201, 7203 and 7262. No mention was made of probable cause for violation of 18 U. S. C. A., §§ 1952 and 371. The warrants were served on July 13, 1967, and gambling paraphernalia was seized at each of the defendant's homes.

Thereafter, on July 28, 1967, criminal informations were filed against each defendant charging violation of 26 U. S. C. A., § 7203—failure to pay occupational tax. After the Supreme Court decisions in *Marchetti v. United States,* 390 U. S. 39, and *Grosso v. United States,* 390 U. S. 62, decided on January 29, 1968, the § 7203 charges against each defendant were dismissed on the motion of the United States Attorney.

On June 20, 1968, the indictment upon which the defendants were convicted was filed. Defendants each moved to suppress the evidence seized on the basis that the warrants were not issued upon probable cause, that the warrants were based upon charged violations of statutes which have been declared unconstitutional and that the Fourth and Fifth Amendment rights of the defendants had been violated. The motions to suppress were overruled and the evidence seized under the search warrants was received at the trial.

I

Since the evidence seized in this case was seized under a warrant which alleged probable cause for violations of the taxing and registration statute and not the Travelers Act, the Fourth Amendment issue in this case is whether probable cause for a violation of a statute which is later declared subject to constitutional defense is enough to authorize a search and seizure, the fruits of which are offered into evidence for another offense.

The defendants claim that there was no probable cause for the issuance of the search warrant. Probable cause is based on the situation existing at the time of the issuance of the warrants. At such time, the controlling law was to be found in *Lewis v. United States*, 348 U. S. 419, and *United States v. Kahriger*, 345 U. S. 22. Under the holdings of the cases just cited, probable cause for the issuance of the warrants is clearly established.[1]

The affidavits for the issuance of the search warrants were detailed and conformed to the requirements of Rule 41, Fed. R. Crim. P., and the governing law as stated in *Spinelli v. United States*, 393 U. S. 410; *Aguilar v. Texas*, 378 U. S. 108.

To hold that probable cause cannot be based on a statute which was valid when the search warrants were issued would in effect apply the *Marchetti* and *Grosso* cases retroactively in a Fourth Amendment context. No retroactive effect on the probable cause issue should be given to *Marchetti* and *Grosso* for the reasons that such effect was rejected in *Linkletter v. Walker*, 381 U. S. 619 (*Mapp v. Ohio*, 367 U. S. 643, not applied retroactively), and *Desist v. United States*, 394 U. S. 244, (*Katz v. United States*, 389 U. S. 347, denied retroactive application). As stated in *Desist*, " 'there is no likelihood of unreliability or coercion present in a search-and-seizure case'; the exclusionary rule is but a 'procedural weapon that has no bearing on guilt,' and 'the fairness of the trial is not under attack.' " 394 U. S. 244, 250.

The purpose of the Fourth Amendment is to protect citizens against unnecessary intrusions into their privacy. *Berger v. New York*, 388 U. S. 41, 59; *Warden v. Hayden*, 387 U. S. 294, 301; *Jones v. United States*, 357 U. S. 493,

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[1] We express no view on whether probable cause would exist in the present factual situation if the warrants had been issued subsequent to the *Marchetti* and *Grosso* opinions.

498. We hold that compliance with the provisions of Rule 41, providing for the issuance of a search warrant based on probable cause for a violation of a then valid statute, adequately protects the individual's right of privacy guaranteed by the Fourth Amendment. *Camara v. Municipal Court,* 387 U. S. 523, 534.

The fact that the warrants were based on gambling operations violative of revenue statutes and that the present convictions were based on violation of 18 U. S. C. A., § 1952 and conspiracy to violate § 1952 is not significant. It is established that evidence lawfully seized under a valid search warrant or as an incident to a lawful arrest may be used against a party on trial for a different offense. *Gouled v. United States,* 255 U. S. 298, 311;[2] *Williamson v. United States,* 5 Cir., 285 F. 2d 65; *Harris v. United States,* 10 Cir., 151 F. 2d 837, 841. See *Abel v. United States,* 362 U. S. 217, 240.

The court committed no error in refusing to suppress the seized evidence on Fourth Amendment grounds.

The Fifth Amendment privilege against self-incrimination provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." The defendants make two privilege against self-incrimination arguments: (1) All defendants argue that because they did not incriminate themselves (register and pay the tax) the government was able to obtain evidence against them. They argue that the *use* of this evidence violates the privilege against self-incrimination because it is "punishing" them for refusal to incriminate themselves. (2) Defendants Boveri and Meyer argue that the evidence seized as a result of the search of their homes may not be used

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[2] *Gouled* treated other issues, such as mere evidence exclusion. *Warden v. Hayden,* 387 U. S. 294, overrules *Gouled* on the mere evidence exclusion issue but nothing therein impairs the validity of the *Gouled* decision upon the issue for which it is cited.

as evidence because it is testimonial in nature and thereby protected by the privilege against self-incrimination.

In support of their contention that they are being punished for not incriminating themselves, defendants rely largely upon the reasoning of Judge Frank A. Kaufman in *Silbert v. United States,* 282 F. Supp. 635, and a supplemental opinion at 289 F. Supp. 318. Judge Kaufman squarely holds "that the searches and seizures did not, when they were made, violate the proscriptions of the Fourth Amendment or of Federal Criminal Rule 41." 282 F. Supp. 635, 646. He then points out that the Government has been guilty of no improper conduct in obtaining the warrant and making the seizures, and goes on to say:

> "However, the non-culpability of the Government in relation to the issues considered by the Court concerning the raids in these cases does not answer the questions raised herein in a Fifth Amendment context. The opinions in *Marchetti* and *Grosso* discuss policies unrelated to Government wrongdoing and lay great stress upon the fact that the federal wagering tax statutes and the Government's enforcement machinery in connection therewith not only create a federal statutory scheme, but also are keyed to aiding the states in connection with ascertaining and successfully prosecuting violations of comprehensive state and local wagering prohibitions. *Marchetti* and *Grosso* both emphasize that one of the principal bases for the doctrines therein enunciated is that a person who is subject to the wagering tax provisions of Title 26 must make a choice between Scylla and Charybdis, in determining whether to violate those provisions, or to incriminate himself under state law and perhaps other federal laws by complying with the federal wagering tax requirements. The Supreme Court stated, in *Marchetti* and *Grosso,* that the exercise of the Fifth Amendment privilege against self-incrimination may

not be so encumbered and abridged." 282 F. Supp. 635, 647.

Judge Kaufman then points out that the evidence could not have been obtained under the search warrants if the defendants had not "chosen to avoid incriminating themselves by failing to comply with the federal wagering tax law requirements" and that they have thus been afforded "curtailed self-incrimination protection and limited constitutional comfort." 282 F. Supp. 635, 647.

In our view, the reasoning of the *Silbert* cases is directed to the issue of whether *Marchetti* and *Grosso* should be retroactively applied on the issue of probable cause for a search. Judge Kaufman applies those cases retroactively in this context because he finds that the privilege against self-incrimination would be in some way diminished by failure to suppress. We cannot agree.

We find the Fifth Amendment grounds advanced by the defendants for applying *Marchetti* and *Grosso* retroactively on the search and seizure issue not compelling. The Fifth Amendment protects a person from being required to give testimonial disclosures. The issue of the legality of the search under the Fourth Amendment is separate and distinct from the issue of whether the evidence seized is self-incriminating.

The position we have taken is supported by *DiPiazza v. United States,* 6 Cir., 415 F. 2d 99, 106-07; *Kuhn v. United States,* 6 Cir., 415 F. 2d 111; *State v. Sellaro,* Mo., 448 S. W. 2d 595, 597; *State of New Jersey v. Gerardo,* 250 A. 2d 130; *United States v. Yeagle,* E. D. Ky., 299 F. Supp. 257, 259.

The Fifth Amendment problem before us resembles that presented in *United States v. Knox,* 396 U. S. 77. In that case, the Supreme Court by a six-to-two vote rejected defendant's contention that the two counts charging the

defendant with willfully and fraudulently stating the number of employees accepting wagers on his behalf violated 18 U. S. C. A., § 1001. Defendant contended that if he had filed truthful returns, he would have incriminated himself under § 4412 and that if he had filed no returns at all, he would have subjected himself to punishment under § 7203, and that in choosing to file a false return he chose the least of three evils and that thus his choice was involuntary under the Fifth Amendment. In rejecting this argument, the Court states:

> "For this proposition Knox relies on *United States v. Lookretis,* 398 F. 2d 64 (C. A. 7th Cir. 1968), where, after this Court had remanded for reconsideration in light of *Marchetti,* see 390 U. S. 338 (1968), the Court of Appeals ruled that truthful disclosures made under the compulsion of § 4412 could not be introduced against their maker in a criminal proceeding. However, the Fifth Amendment was offended in *Lookretis* precisely because the defendant had succumbed to the statutory compulsion by furnishing the requested incriminatory information. Knox does not claim that his prosecution is based upon any incriminatory information contained in the forms he filed, nor that he is being prosecuted for a failure to supply incriminatory information. He has taken a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take.
>
> "This is not to deny that the presence of §§ 4412 and 7203 injected an element of pressure into Knox's predicament at the time he filed the forms. . . . But when Knox responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion." 396 U. S. 77, 82.

See *Bryson v. United States,* 396 U. S. 64.

Marchetti, after holding that a person who has asserted his privilege against self-incrimination cannot be prosecuted for failure to register or pay the occupancy tax, carefully by way of limitation adds:

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements." 390 U. S. 39, 61.

In our present case, defendants are not being punished criminally or otherwise for failure to comply with the wagering tax laws. They are being punished for violating § 1952, proscribing interstate gambling. The failure to register or pay the tax is not an element of the § 1952 charge. Defendants have not complied with the registration or tax laws and no evidence has been offered or received in their trial before the jury with respect to violation of the wagering tax laws. The only way the wagering tax is here involved is that it offers probable cause under the Fourth Amendment for the search. Probable cause for the search is a Fourth Amendment issue and such issue has heretofore been discussed and decided adversely to the defendants.

Counsel for Boveri and Meyer has by supplemental brief on rehearing for the first time raised the issue that the items seized were compelled communications or testimony protected by the Fifth Amendment. Counsel for Hanon does not raise such issue. In Hanon's supplemental brief, counsel in effect concedes that the evidence seized under the search warrants directed to the various defendants was physical, non-testimonial evidence (gambling paraphernalia). All members of the panel participating in the hearing on the original appeal agreed that the seized

items were not testimonial. The items consisted of telephone numbers, betting tabs, checks, money, betting settlement cards, racing forms and baseball scoreboards, containing names and numbers written after each of them, and other items all of which would fall in the general category of gambling paraphernalia. Counsel for Boveri and Meyer has failed to point to the specific evidence which he claims is communicative or testimonial or the reasons why it should be so considered.

Moreover, if any evidence seized could be considered incriminating and testimonial, the problem still remains as to whether such testimony was the product of any sort of coercion. In *Hoffa v. United States,* 385 U. S. 293, 303-04, an informer had reported the defendant's incriminating testimonial disclosures. In rejecting defendant's claim that such evidence should be suppressed on Fifth Amendment ground, the Supreme Court held:

> "In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege was violated in this case."

We are satisfied that none of the entries made upon any of the seized evidence was the result of any sort of coercion.

We reject all contentions that defendants' Fifth Amendment protection against self-incrimination has been violated.

II

Defendants raise a number of contentions in support of their claim that error was committed in overruling their motions for judgment of acquittal. Defendants rested on

the motions for acquittal made at the close of the Government's case and offered no evidence in their own behalf. The contention that the seized evidence could not be received and hence could not be considered has been disposed of by our resolution of the constitutional issues.

Defendants urged that the trial court erroneously construed § 1952 as not requiring the prosecution to prove that the facilities of interstate commerce were used knowingly, willfully and intentionally. The pertinent portion of § 1952 reads:

> "Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity . . . (b) as used in this section 'unlawful activity' means (1) any business enterprise involving gambling. . . ."

The court's construction of the statute is reflected by its instruction reading:

> "With respect to Count I and Count II of the Indictment, it is necessary that the government prove beyond a reasonable doubt that John L. Boveri intended to promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of the business enterprise involving gambling offenses, which he knew to be in violation of the laws of the State of Missouri. It is not necessary that the government prove John L. Boveri intended to use interstate facilities or that he intended to violate federal law. However, it is necessary that interstate telephone facilities were, in fact, used and that John L. Boveri either used or caused them to be used."

Defendants' attack is directed to the last two sentences of the instruction quoted and substantially the same language contained in the conspiracy count instruction. Defendants objected to the instruction on the ground that it failed to require the Government to prove knowledge of the use of or intent to use interstate facilities and to the failure of the court to give their tendered instruction setting forth knowledge and intent with respect to the use of interstate facilities as an essential element of the offense. We believe the court correctly interpreted the statute.

Federal jurisdiction of the crime here charged is based on the use of a facility of interstate commerce. The statute by its terms does not require the use of the facility to be intentional or willful. Defendants' argument on this issue in our view is conclusively answered by the well-reasoned opinion of Judge Beamer, supported by responsible authority, in *United States v. Bash,* N. D. Ind., 258 F. Supp. 807, and the affirming opinion, sub nom. *United States v. Miller,* 7 Cir., 379 F. 2d 483. See *United States v. Izzi,* 7 Cir., 385 F. 2d 412.

The evidence amply supports a finding of the existence of the gambling operation in violation of Missouri law as charged. Defendants concede that the record shows that interstate telephone calls placing wagers were made by John Grady from Alton, Illinois, to each of the defendants in Missouri. Such is a sufficient use of the interstate facility to establish the jurisdictional requirement of the use of an interstate facility. It is not necessary for the Government to prove defendants knew that the calls received from an out-of-state source were in fact out-of-state calls.

Lastly, defendant Hanon alone raises the issue that there is no substantial evidence to establish that he was a part of the alleged conspiracy. We have frequently considered and stated the standards to be applied in determining the

sufficiency of evidence to establish a conspiracy. See *Koolish v. United States,* 8 Cir., 340 F. 2d 513, 523-24; *Isaacs v. United States,* 8 Cir., 301 F. 2d 706, 725.

Secrecy and concealment usually prevail in a successful conspiracy. Hence a conspiracy can seldom be established by direct evidence. As stated in *Koolish*:

> " 'Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances' " . . . "Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of wh~ther the stick fits so natural into position in the fagot as to convince that it is a part of it." 340 F.2d 513, 524.

In our present case, substantial evidence exists to support a finding that a conspiracy to engage in gambling operations contrary to Missouri law existed between Boveri, Meyer and others. Boveri and Meyer do not claim otherwise. Close connections between Boveri and Hanon are established. Hanon's code name assigned by Boveri and his telephone number were given by Boveri to his agents and customers. Boveri frequently instructed his agents to obtain odds on sporting events from Hanon and this was done. Hanon and Boveri made layoff bets with each other. The fact that Hanon also operated at times as an independent bookmaker does not foreclose his participation in the conspiracy.

We hold the defendants have had a fair trial and that no prejudicial error has been committed.

Our judgment filed January 7, 1970, reversing the judgment of conviction as to each defendant and remanding for a new trial is vacated and set aside. The judgment of conviction as to each defendant is affirmed.

LAY AND HEANEY, dissenting.

This court holds today that the exercise of the privilege against self-incrimination, although no longer directly punishable under *Marchetti-Grosso*,[1] is nevertheless subject to sanction.

Here the government used the defendants' exercise of their Fifth Amendment privilege against self-incrimination as the sole[2] basis for obtaining evidence to convict them. When the evidence was used (*post Marchetti-Grosso*), a "sanction" was thus effected against users of the privilege. The privilege is too sancrosanct to be so easily eluded and abused.

An individual's failure to register or pay the tax to avoid self-incrimination should not provide the direct avenue to obtain evidence to prosecute on other charges. Whether the government prosecutes for failing to pay the tax, or seizes evidence to prosecute under other criminal laws for such failure, makes little difference. In each instance it renders a penalty in response to a defendant's exercise of his Fifth Amendment rights. Whether it does so by direct or indirect means should be immaterial. If defendants' privilege not to register or pay the tax may serve as the basis of obtaining evidence for state or federal authorities to proceed on other charges, the dilution of the privilege has been accomplished, and the rationale of *Marchetti* and *Grosso* has been rendered meaningless.

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[1] *Marchetti v. United States*, 390 U. S. 39 (1968) and *Grosso v. United States*, 390 U. S. 62 (1968).

[2] It is peculiarly significant here that the basis of the affidavit leading to the search, alleged violation of only 26 U. S. C. A., § 7203 and related sections. Probable cause for a search under 18 U. S. C. A., § 1952 was not alleged, as it had been in *DiPiazza v. United States*, 415 F. 2d 99 (6 Cir. 1969), cited in the majority opinion. (See appellant's supplemental brief, page 8, relying upon "Defendant's Exhibits No. 12 and No. 16, Appendix P. 38a and 43a, Cause No. 18593-18594, Sixth Circuit.") Allegation of a § 1952 violation within the affidavit materially distinguishes the instant facts.

Today's holding means that the government has found the effective way to punish a defendant for exercising the privilege. The Hobson choice still exists. The recognition of this "whipsaw" effect is the true significance of Judge Kaufman's opinion in *Silbert v. United States*, 282 F. Supp. 635, 647 (D. Md. 1968).[3] The identical question was faced by the Pennsylvania Supreme Court where Mr. Justice Roberts speaking for the full court in *Commonwealth v. Katz*, 429 Pa. 406, 240 A. 2d 809, 811 (1968), said:

> "We therefore believe that if a federal prosecution based upon violations of sections 4411 and 4412 (and evidence seized to prove these violations) would infringe the accused's privilege against self-incrimination and if this privilege applies to the states, then a state prosecution based upon the same evidence seized by federal officers would equally violate that privilege. Were the rule otherwise, the *Marchetti* decision and its conclusion that prosecutions for violations of the federal statutes here involved run afoul of the fifth amendment could be easily eroded if state prosecutions based upon evidence seized by federal officers searching for violations of the now unconstitutional statutes were permitted. Whether this evidence is used in state or federal court, the evil is identical—an accused's failure to register and pay the tax, as well as evidence seized to prove this failure, becomes the basis of a criminal prosecution violative of the fifth amendment. Certainly, after *Marchetti*, the evi-

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[3] Judge Kaufman's reasoning in *Silbert* (282 F. Supp. 635) is dismissed by the majority on the rationalization that he is attempting to apply *Marchetti-Grosso* retroactively in a Fourth Amendment context. We respectfully submit this misconstrues his concern over the encroachment upon the exercise of the defendants' Fifth Amendment rights. The sanction in *Silbert*, as here, was not at the time of the search but in the *use* of the evidence seized in a subsequent criminal prosecution. Retroactivity of *Marchetti-Grosso* is not an issue under either the *Silbert* case or here since the objectional encroachment on defendants' Fifth Amendment rights comes *after* the decision of *Marchetti-Grosso*.

dence used to convict appellants could not be constitutionally admitted in a federal court; were we to admit it, we believe that an identical constitutional violation would be committed."[4]

The fact that the evidence seized is not itself self-incriminating is irrelevant to the discussion. In setting aside a conviction for contempt of court arising from the lawful exercise of the privilege the Supreme Court observed:

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[4] This same rationale was used by the Seventh Circuit in *United States v. U. S. Coin & Currency Amount of $8,674.00* (Angelini-claimant), 393 F. 2d 499 (7 Cir. 1968), cert. granted 393 U. S. 949 (1968), in a forfeiture proceeding. The Court there said:

> "The only apparent purpose of 26 U. S. C., § 7302, as applied here, is to punish violators of Sections 4411 and 4412 of the Internal Revenue Code by taking away money used in committing the violations. See *One 1958 Plymouth Sedan v. Com. of Pennsylvania*, 380 U. S. 693, 700, 85 S. Ct. 1246, 14 L. Ed. 2d 170. As a practical matter, *Marchetti* means that such violations are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture." 393 F. 2d at 500.

See 33 Albany L. Rev. 158 (1968). In accord, *United States v. $3,296.00 in Currency*, 286 F. Supp. 543 (N. D. N. Y. 1968); *United States v. $125,882 in U. S. Currency*, 286 F. Supp. 643 (S. D. N. Y. 1968); *United States v. One 1967 Buick Electra 225*, 289 F. Supp. 642 (D. N. J. 1968); *United States v. One Philco Television*, 292 F. Supp. 35 (S. D. Tex. 1968); *United States v. Riccio*, 282 F. Supp. 979 (N. D. Ill. 1968); cf. *Pizzarello v. United States*, 408 F. 2d 579, 587 (2 Cir. 1969) (levy of jeopardy assessment). Contra: *United States v. One 1965 Buick* (Dean-claimant), 392 F. 2d 672, on rehearing 397 F. 2d 782 (6 Cir. 1968); *United States v. Filing*, 410 F. 2d 459 (6 Cir. 1969); *United States v. Yeagle*, 299 F. Supp. 257 (E. D. Ky. 1969). And compare *Washington v. United States*, 402 F. 2d 3 (4 Cir. 1968). Certiorari was applied for in the *Dean* case on October 8, 1968, and the *Washington* case on December 13, 1968. These petitions are still pending before the Supreme Court.

If the ultimate decision of the Supreme Court is as the Sixth Circuit reasons, that a forfeiture proceeding is "civil" in nature (but see *Boyd v. United States*, 116 U. S. 616, 634 (1886)), then the *Dean* case is clearly distinguishable from one where the evidence seized is used in another criminal proceeding. However, if the *Angelini* ruling of the Seventh Circuit is affirmed, the evidence seized and subsequently used in a forfeiture proceeding is a punishment and criminal in nature. *Angelini* would thus serve as a binding and direct precedent in support of defendants' Fifth Amendment claims here.

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty,* as held in *Twining,* for such silence." (Emphasis ours.) *Malloy v. Hogan,* 378 U. S. 1, 8 (1964).

See also *Hoffman v. United States,* 341 U. S. 479 (1951).

In *Griffin v. California,* 380 U. S. 609 (1965), the Court considered *the effect* of a state prosecutor's comments that the defendant's silence was evidence of guilt. The Supreme Court observed:

> "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' *Murphy v. Waterfront Comm'n,* 378 U. S. 52, 55, which the Fifth Amendment outlaws. It is a *penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.*" (Emphasis ours.) *Id.* at 614.

See also *Chapman v. California,* 386 U. S. 18 (1967).

The entire theme of subsequent decisions has demonstrated that the substance of the constitutional privilege is cannibalized if individuals may be punished for exercising it. In *Spevack v. Klein,* 385 U. S. 511 (1967), involving a disbarment proceeding of a lawyer who refused to produce financial records and to testify at the inquiry, the Supreme Court observed:

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California,* 380 U. S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' " *Id.* at 515.

And quoting from *Boyd v. United States,* 116 U. S. 616, 634-635, the Court in *Spevack* added:

> "'It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"

See also *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation,* 392 U. S. 280 (1968); *Slochower v. Board of Higher Education,* 350 U. S. 551 (1956).

Although made in a different context, the words of Mr. Justice Frankfurter in *Nardone v. United States,* 308 U. S. 338 (1939), are pertinent here.

> "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Id.* at 340.

We need not perform any balancing act of weighing effects of a lawful search vis-a-vis an assertion of the privilege against self-incrimination. It remains fundamental that any significant encroachment on the freedom to exercise the privilege cannot receive sustenance under the law.[5]

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[5] The recent case of *United States v. Knox,* 396 U. S. 77 (1969), should not provide the government any comfort. As contrasted to the defendants' exercise of their privilege against self-incrimination in the instant case, by noncompliance with §§ 4412 and 7203, the Supreme Court in *Knox* makes clear that Knox's fraudulent filing under § 4412 was ". . . a course other than the one that the statute was designed to compel, *a course that the Fifth Amendment gave him no privilege to take.*" (Emphasis ours.) The indictment in *Knox* was upheld under inapposite principles to those involved here. The Supreme Court relied upon the reasoning in *Bryson v. United States,* 396 U. S. 64 (1969), decided the same date. In *Bryson* the Court emphasized the language of *Dennis v. United States,* 384 U. S. 855, which stated:

> "The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prose-

The majority justifies applying a sanction to the defendants' exercise of the privilege here because the evidence in question was obtained by a legal search. They urge that evidence legally seized for one offense may be lawfully used for prosecution of another. While this is a correct statement of the law in other contexts, it is not valid here.[6] The arguments alleging violations of the Fourth and Fifth Amendments are not equivalent in the present context. Cf. *Schmerber v. California,* supra. The majority's Fourth Amendment analysis fails to come to grips with the fact that a sanction has been applied to the defendants' lawful exercise of the Fifth Amendment privilege.

The argument that the lawful search erases the "compulsory" aspect in the production of the evidence seized[7] concerns itself with the nature of the evidence seized rather than with the subsequent sanction applied. The gravamen of the harm is that the defendants were forced to choose

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cution directed at petitioner's fraud. It is not an action to enforce the statute claimed to be unconstitutional."

It is also clear that *Knox* dealt with the dismissal of an indictment and the Court reserved opinion as to the "compulsion" issue under *Marchetti* as "one that must be determined . . . at his trial." We in no way intimate that the defendants' indictment under § 1952 is invalid in the instant case.

[6] In dissenting, since we feel a reversal necessary, we need not pass upon the issue argued on rehearing that the personal papers of the defendants seized were self-incriminatory so as to constitute an illegal search under the Fourth Amendment. See *Boyd v. United States,* 116 U. S. 616 (1886). This question, that is, "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure," was left open in *Warden v. Hayden,* 387 U. S. 294, 303 (1967). See also *Schmerber v. California,* 384 U. S. 757, 772 (1966).

For a full discussion of the relationship between the Fourth and Fifth Amendments see The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship", 13 U. C. L. A. L. Rev. 857 (1966); Constitutional Law: Supreme Court Delineates the Relationship Between the Fourth and Fifth Amendments, 1967 Duke L. J. 366 (1967). Cf. *Boyd v. United States,* 116 U. S. at 633.

[7] 8 Wigmore, Evidence § 2264, n. 4 (McNaughton rev. 1961).

between providing evidence to prosecuting authorities by registration and payment of the tax *or* by failing to register and pay the tax, subjecting themselves to a search of their premises. The *compulsion* thus came prior to the search and not from the search itself. There would be no *harm* under this compulsion if the evidence seized was never used. However, in the instant case, the *penalty* for refusing to incriminate themselves came thereafter in the *use* of the evidence in prosecution under § 1952 and not from any incrimination arising from the evidence being lawfully seized.

One further observation should be offered. The government urged in *Marchetti* that the federal statute be enforced and that the privilege be protected by placing restriction upon the *use* of the evidence obtained. Cf. *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964). The Supreme Court reasoned, however, that such a rule would impair state prosecutions by possibly tainting the use of evidence otherwise lawfully seized. The Court observed that it would be too onerous a burden upon a state to always demonstrate that the evidence it had otherwise legally seized was not based upon information obtained as a consequence of a defendant's registration or payment of the tax. 390 U. S. at 59. With the rejection of the argument of restricted use, the government now seeks here to completely enervate the Supreme Court's holding by contending that the evidence obtained as a direct consequence of noncompliance may be used to prosecute defendants under other laws, regardless of how tainted the evidence may be. In our judgment, such circumlocution degrades the dignity of an individual's Fifth Amendment rights.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment

United States Court of Appeals
For the Eighth Circuit

September Term, 1969

United States of America, Appellee, vs. Eugene Hanon, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

This Cause having been resubmitted to this Court en banc on the printed appendix from the United States District Court for the Eastern District of Missouri and argued by counsel,

It is now here ordered and adjudged by this Court that the judgment of this Court filed January 7, 1970, reversing the judgment and sentence of the said District Court and remanding the case for a new trial be, and is hereby, vacated and set aside.

It is further ordered by this Court that the judgment and sentence of the said District Court in this cause be, and is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, Eugene Hanon, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

June 8, 1970

Statutes

Title 26 Statutes are as follows:

Section 4401. Imposition of Tax.

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter [§§ 4401-4405 of this title], all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate that an amount equal to the tax imposed by this subchapter [§§ 4401-4405 of this title] has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter [§§ 4401-4405 of this title] on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter [§§ 4401-4405 of this title] on all wagers placed in such pool or lottery.

Section 4411. Imposition of Tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Section 4412. Registration.

(a) Requirement.—Each person required to pay a special tax under this subchapter [§§ 4411-4414 of this title] shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A [§§ 4401-4405 of this title], each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A [§§ 4401-4405 of this title], the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter [§§ 4401-4423 of this title].

Section 4901. Payment of Tax.

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wa-

gering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

(2) Assessment.—For authority of the Secretary or his delegate to make assessments where the special taxes have not been duly paid by stamp at the time and in the manner provided by law, see subtitle F [§§ 6001-7852 of this title].

Section 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return

(other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Section 7262. Violation of Occupational Tax Laws Relating to Wagering—Failure to Pay Special Tax.

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

Title 18 Sections are as follows:

Section 371. Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.—(a) Whoever

travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Judgment

United States Court of Appeals
For the Eighth Circuit

No. 19521 September Term, 1969

United States of America,
Appellee,

vs.

John L. Boveri,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause having been resubmitted to this Court en banc on the printed appendix from the United States District Court for the Eastern District of Missouri and argued by counsel,

It is now here ordered and adjudged by this Court that the judgment of this Court filed January 7, 1970, reversing the judgment and sentence of the said District Court and remanding the case for a new trial be, and is hereby, vacated and set aside.

It is further ordered by this Court that the judgment and sentence of the said District Court in this cause be, and is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, John L. Boveri, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

June 8, 1970

Order entered in accordance with opinion.

Robert C. Tucker
Clerk, U. S. Court of Appeals
8th Circuit

Judgment

United States Court of Appeals
For the Eighth Circuit

No. 19520 September Term, 1969

United States of America,
Appellee,

vs.

Gloria Meyer,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause having been resubmitted to this Court en banc on the printed appendix from the United States District Court for the Eastern District of Missouri and argued by counsel,

It is now here ordered and adjudged by this Court that the judgment of this Court filed January 7, 1970, reversing the judgment and sentence of the said District Court and remanding the case for a new trial be, and is hereby, vacated and set aside.

It is further ordered by this Court that the judgment and sentence of the said District Court in this cause be, and is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, Gloria Meyer, do surrender herself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon her, within thirty days from and after date of filing of the mandate of this Court in the District Court.

June 8, 1970

Order entered in accordance with opinion.

Robert C. Tucker
Clerk, U. S. Court of Appeals
8th Circuit

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 358

EUGENE J. HANON, GLORIA MEYER AND JOHN L. BOVERI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Missouri petitioner Boveri was convicted of use of interstate facilities to promote an illegal gambling enterprise, in violation of 18 U.S.C. 1952, and all petitioners were convicted of conspiracy to violate this statute.[1] Boveri was sentenced to a total of five years' imprisonment and fined $10,000; Hanon was sentenced to three years' imprisonment and fined $5,000; and Meyer was sentenced to two years' imprisonment. On appeal, a panel of the court reversed the judgments of conviction, but on

[1] A fourth defendant was also convicted of conspiracy but did not appeal.

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rehearing *en banc,* the court of appeals, with two judges dissenting, affirmed the judgments.

The evidence showed a bookmaking operation, illegal under state law, which made use of interstate facilities. In proving its case, the government introduced into evidence gambling records which had been seized under federal search warrants asserting violations of the federal wagering tax laws. The affidavits supporting the warrants recited detailed facts showing that each petitioner was engaged in wagering activities (A. 18–65),[2] and stated that each had not purchased a wagering tax stamp. The warrants were executed in July 1967, prior to the decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62. There was thus probable cause for their issuance at that time under *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419. The issue here is whether the subsequent decisions in *Marchetti* and *Grosso* nevertheless require exclusion of evidence seized pursuant to the warrants because they were based upon asserted violations of the wagering tax laws.[3] We submit they do not.

In *Marchetti* and *Grosso,* this Court held only that those who properly assert a Fifth Amendment privilege against self-incrimination may not be criminally convicted for failure to register or pay occupational and excise taxes under the wagering tax laws. Petitioners have not, of course, been convicted for any such failure, but rather for other gambling violations

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[2] "A." refers to the appendix before the court of appeals.

[3] The same question is raised in *Kuhn* v. *United States,* No. 5088, this Term.

that raise no constitutional question. Thus, their only complaint is that the search warrants were based upon allegations of violations for which they could not have been convicted if they had been charged and properly asserted the privilege. They do not deny that the warrants were based upon probable cause as the law then stood. Nor were the warrants based upon any information supplied by petitioners. Under these circumstances, the relationship between petitioners' convictions and the vice found in *Marchetti* and *Grosso* is too tenuous to affect the validity of these convictions.

In any event, acceptance of petitioners' contention would require retroactive application of *Marchetti* and *Grosso,* something that we submit should not be done in such a collateral situation as this, where the effect would be to deprive the government of the use of reliable evidence that was entirely lawful when obtained. See *Desist* v. *United States,* 394 U.S. 244; *Tehan* v. *Shott,* 382 U.S. 406; see also *United States* v. *Wallace Co.,* 336 U.S. 793.[4]

United States v. *United States Coin and Currency in the Amount of $8,674, Donald Angelini, Claimant,* No. 5, this Term, presents the questions whether the decisions in *Marchetti* and *Grosso* should be applied to forfeiture proceedings directed against property used in violation of the federal wagering tax laws and, if so, whether the rule adopted in those cases should be applied where the seizures occurred

[4] In *Stanley* v. *Georgia,* 394 U.S. 557, 569, the concurring opinion of three members of this Court considered a similar warrant to be valid.

prior to the date of the decisions. Another question of collateral application of *Marchetti* and *Grosso* is presented in *Mackey* v. *United States,* No. 36, this Term.

For the reasons stated, the petition should be denied. However, since the issue here is related to those presented in *Angelini* and *Mackey,* the Court may wish to defer disposition of the petition until after those cases are decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 358

EUGENE J. HANON, GLORIA MEYER and JOHN L. BOVERI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY MEMORANDUM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

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EUGENE J. HANON, GLORIA MEYER and JOHN L. BOVERI,
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Respondent.

REPLY MEMORANDUM

In its Memorandum in Opposition the United States suggests that because the issue in this case is related to those presented in **Angelini** and **Mackey**, the Court may wish to defer disposition of the instant petition until after those cases are decided. In those cases the retroactivity of the wagering tax provisions is before the Court in a different context than here; nowhere are the search warrant aspects of the instant case presented. This plus the other issues in those cases means that those decisions would not necessarily dispose of the questions raised here by the post-

Marchetti-Grosso use of evidence seized pursuant to pre-**Marchetti-Grosso** search warrants based on the putative wrongdoer's assertion of his Fifth Amendment privilege i. e. his failure to file incriminating wagering tax information about himself. Neither would **Angelini** and **Mackey** necessarily resolve the conflict which has already developed in the state courts (see Petition, p. 6) and presently exists between the members of the Eighth Circuit sitting *en banc*. As said by the Solicitor General in his Petition for a Writ of Certiorari in **United States v. Lucia**, No. 186, this Term, p. 6, where another aspect of the same general question of retroactivity was ruled by the Fifth Circuit *en banc*, "The question is an important and recurring one—as the volume of litigation thereon shows—and thus warrants resolution by this Court."

For the reasons stated, the petition should be granted so that this serious aspect of the total question can be canvassed and ruled harmoniously with **Angelini** and **Mackey**. It deserves to be decided upon the imprimatur of importance contained in its own careful record which the Eighth Circuit has already ordered twice argued and briefed.

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